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In the Supreme Court

of the

United States

October Term 1968

No. 1136

GLENS FALLS INSURANCE COMPANY,

Petitioner,

vs.

NATIONWIDE MUTUAL INSURANCE COMPANY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondents.

Brief of Respondent Nationwide Mutual Insurance Company in Opposition to Petition of Glens Falls Insurance Company for a Writ of Certiorari to The Supreme Court of the State of Montana

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THIS COURT HAS NO JURISDICTION

No federal question or constitutional issue was ever suggested to, considered by, nor passed upon by either the Montana State District Court or the Montana Supreme Court.

Prior to July 26, 1964, petitioner and respondents, each executed and delivered separate liability insurance contracts within the State of Montana to indemnify their insureds for all tort liability imposed on their insureds arising out of motor vehicle accidents. *Section 53-109, R.C.M. 1947,* governing the procedure for the transfer of any title or interest in motor vehicles, including the result of failing to comply with the procedure set out in the statute, had been in effect since 1945, some eighteen years before the contracts involved were executed. Statutes which subsist at the time and place of the making of a contract enter into and form a part of that contract as if the statutes were expressly incorporated in its terms, including those terms which affect its validity, construction, discharge, and enforcement *(Von Hoffman v. City of Quincy, 1866, 4 Wall. 535 at 550, 18 L.Ed. 403 at 408; Valier Company v. State, Mont., 123 Mont. 329, 215 P.2d 966, cert. den. 71 S.Ct. 63, 340 U.S. 827, 95 L.Ed. 607.)*

On July 26, 1964, there was an automobile accident in the State of Montana as a result of which the injured plaintiff filed a tort action in a Montana State District Court. The tort defendant, Michael Parker, filed a third-party complaint against the petitioner and the respondents claiming that he was insured under one or more of the three insurance contracts then in force and effect.

Petitioner Glens Falls Insurance Company filed ten or more documents in the third-party action in the Montana State District Court, including two answers; a motion for summary judgment; a stipulation for submission of the issue of insurance coverage to the Montana District Court prior to trial on written briefs; proposed findings of fact and conclusions of law; exceptions to findings of fact and conclusions of law; objection to the judgment entered; a motion for new trial; legal briefs presenting its views; and a notice of appeal. The Montana State District Court made findings of fact and conclusions of law *(Pet. app. 1)*, and entered its judgment *(Pet. app. 5)* that the insurance contract of the petitioner Glens Falls afforded coverage to the tort defenant, Michael Parker, as an insured under that Glens Falls contract. There was never suggested to the Montana District Court in any form whatsoever any federal question or issue of constitutional violation. The only issue that was ever presented to the Montana District Court was the construction and enforcement of the three insurance contracts under applicable Montana law.

On appeal to the Montana Supreme Court, the brief of the appellant is required to spell out a statement of the legal issues presented for review, and the argument in support thereof *(Rule 23, Montana Rules of Appellate Civil Procedure)*. The only legal issue presented to the Montana Supreme Court in this case by any party,

and the only issue decided, was the construction and enforcement of the three insurance contracts under applicable Montana state law as it had been construed in the State District Court *(Pet. app. 8)*.

The sole basis for claiming that this court has jurisdiction in this case is this statement by Glens Falls in its petition (wholly unsupported in the documentary records of this case):

> "During oral argument before the Montana Supreme Court, attorney for petitioner pointed out that if effect was not given to the foregoing exclusion, *Sec. 53-109(d) Revised Codes of Montana,* impaired the right of *Glens Falls* and *Midland* to contract. * * *" *(Pp. 6.)*

Such statement, if made, raises no valid legal issue under any law whether common law, Montana law, or federal law. As indicated above, *Section 53-109(d)*, enacted in 1945, was in full force and effect in 1963 or 1964 when the three insurance contracts involved were issued within the State of Montana. The statute when enacted in 1945 could not impair the obligations of these three insurance contracts not yet in existence. Petitioner Glens Falls was not obligated to enter into or issue its insurance contract . Furthermore, if the attorney for the petitioner made the oral argument to the Montana Supreme Court as worded in the petition, it does not even suggest an issue with respect to passage of an ex post facto law or law that would impair the obligations of existing contracts in violation of *Section 10, Article I;*

nor an issue with respect to violation of the power of Congress to regulate interstate commerce afforded by *Section 8, Article I;* nor an issue with respect to violation of the Fourteenth Amendment. As presented in the language of the petition the argument does not raise any valid legal issue of any description.

Rule 34, Montana Rules of Appellate Civil Procedure, entitled "Petitions for Rehearing," provides in part:

> "* * * A petition for rehearing may be presented upon the following grounds and none other: That some fact, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the Court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the Court was not directed. Oral argument in support of the petition will not be permitted. * * *"

If counsel for petitioner made the oral argument to the Supreme Court of Montana as suggested in the petition, it was never called to the attention of the Supreme Court of Montana in any petition for rehearing, because no petition for rehearing was ever filed.

The case decisions of the Supreme Court of the United States cited or quoted by the petitioner Glens Falls Insurance Company do not support its contention that this court has jurisdiction. They hold directly to the contrary under the facts of this case. It is essential to the jurisdiction of this court in entertaining a petition for writ of certiorari to the Supreme Court of any state,

that one of the federal questions involved must first have been raised in, and presented to, the state court. Such is not the fact situation in this case. Such was the fact situation in each of the cases cited or quoted in the petition of Glens Falls. For example, in *International Harvester Company v. Missouri, 234 U.S. 199, 58 L.Ed. 1276, 34 S.Ct. 859,* the plaintiff in error had filed in the state court written exceptions to a report of a special commissioner on the specific ground that the Missouri statute violated the equality clause and the due process clause of the Fourteenth Amendment to the Constitution of the United States. In *Bank of Commerce v. State of Tennessee, 161 U.S. 134, 16 S.Ct. 456, 40 L.Ed. 645; on rehearing, 163 U.S. 416, 16 S.Ct. 1113, 41 L.Ed. 211,* the bill of complaint in the State court filed by the State of Tennessee set forth the charter provisions of the Bank of Commerce granted in 1856, the tax laws enacted in 1887, and sought a judgment against the Bank for the taxes levied under those statutes from and after 1887. The Bank filed in the State court a demurrer to that complaint on the specific ground that the general tax laws of 1887 violated the charter provisions of 1856, and were unlawful under the contract provisions of the United States Constitution *(16 S.Ct. at 457).* In *San Jose Land, etc., Company v. San Jose Ranch Company, 189 U.S. 177, 23 S.Ct. 487, 47 L.Ed. 765,* the federal question involved was presented in the State court in a

motion for new trial, in the assignments of error to the Supreme Court of the state, and was spelled out in the opinion of the State Supreme Court. In *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, 279 U.S. 737, 49 S.Ct. 485, 73 L.Ed. 931,* the action was begun in a State court of Texas in 1918 to enjoin the defendant corporation from using any imitation of the name, constitution, titles, etc., of the plaintiff corporation. The answer of the defendant corporation set up the fact that it was incorporated in 1901 under an Act of Congress of May 5, 1870, and asserted that by virtue of the provisions of that Congressional Act, and its incorporation thereunder, the plaintiff was not entitled to any relief, and the same point was presented to the state Appellate Court *(49 S.Ct. at 487-488).* The Supreme Court of the United States said in part:

> "The right thus specially set up in the state court is a federal right. * * *"
>
> *(49 S.Ct. at 488.)*

Under the facts in this case as outlined above, and under the foregoing opinions of the Supreme Court of the United States cited, quoted, and relied upon by the petitioner Glens Falls, this court has no jurisdiction to entertain this petition for writ of certiorari to the Supreme Court of the State of Montana.

This court has no jurisdiction to entertain this petition under the following additional authorities:

Rules 19 and 23(f) Revised Rules of the Supreme Court of the United States, effective October 2, 1967;

Section 1257(3), Title 28 U.S.C.A.;

Black v. Cutter Laboratories, 1956, 351 U.S. 292, 76 S.Ct. 824, 100 L.Ed. 1188;

Ellis v. Dixon, 1955, 349 U.S. 458, 75 S.Ct. 850, 99 L.Ed. 1231;

Louisville & N. R. Co. v. City of Louisville, 166 U.S. 709, 17 S.Ct. 725, 41 L.Ed 1173.

CONCLUSION

This court has no jurisdiction to entertain this petition for writ of certiorari to the Supreme Court of the State of Montana, because the only issue which was ever raised in, presented to, or considered, or decided by either the Montana State District Court or the Supreme Court of the State of Montana, was the construction and enforcement under applicable Montana state law of three Montana contracts of insurance. No federal question or issue of Constitutional law was ever presented to or decided by the state courts, and, in fact, none such is even presented in or raised by the present petition.

In any event, the case is not one of such broad application or importance to warrant this court in accepting the petition even if the court had jurisdiction.

We respectfully submit that the petition of Glens Falls Insurance Company for a writ of certiorari to the

Supreme Court of the State of Montana should be denied.

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